

Appeal No. 5D10-3790

IN THE 5TH DISTRICT FLORIDA COURT OF APPEALS

LEWIS C. LYTTLE and GLADYS M. LYTTLE,

Appellants

v.

BANKUNITED, ASSIGNEE OF THE FDIC,
AS RECEIVER FOR BANKUNITED, FSB,

Appellee

APPEAL IN CAUSE NO. 35-2009-CA-006963

IN THE CIRCUIT COURT OF LAKE COUNTY, FLORIDA

Mark J. Hill, Circuit Judge Presiding

APPELLANT'S INITIAL BRIEF

January 10, 2011

George Gingo, FBN 879533
James Orth, FBN 75941
P.O. Box 838
Mims, FL 32754
321-264-9624 Office
321-383-1105 Fax
ggingo@yahoo.com
jamesorthlaw@gmail.com

TABLE OF CONTENTS

	Page
Table of Contents	2
Table of Citations	3
Table of Cases	3, 4
Table of Statutes	4
Table of Rules.	5
Table of Secondary Sources	5
Statement of the Case and Statement of Facts.	6
Standard on Appeal	15
Summary of the Arguments.	16
Arguments	18
Issue 1: BankUnited offered no evidence that it was entitled to enforce the promissory note.	18
Issue 2: BankUnited failed to provide admissible, timely evidence that it was entitled to enforce the promissory note.	22
Conclusion	25
Certificate of Service	26
Certificate of Font Compliance	27

TABLE OF CITATIONS

<u>TABLE OF CASES</u>	Page
Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986).	16
Atlantic Trust Co. v. Chapman, 208 U.S. 360, 372 (1908).	20
BAC Funding Consortium Inc. v. Jean-Jacques 28 So.3d 936 (Fla. 2 nd DCA, 2010).	21
Booker v. Sarasota, Inc. 707 So. 2d 886 (Fla. 1 st DCA 1998).	21
Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 103 (10th Cir. 1970).	20
City of Cocoa v. Leffler 762 So. 2d 1052 (Fla. 5th DCA 2000).	16, 22
Clear Creek Power & Development Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926)	
Haile v. Henderson Nat. Bank, 657 F.2d 816, 822 (6th Cir. 1981).	20
Holl v. Talcott 191 So. 2d 40 (Fla. 1966).	22
Kitchen v. Ebonite 6 Recreation Ctrs., Inc. 856 So. 2d 1083 (Fla. 5th DCA 2003).	22
Krol v. City of Orlando 778 So. 2d 490 (Fla. 5th DCA 2001).	16, 22
Major League Baseball v. Morsani 790 So. 2d 1071 (Fla. 2001).	15

Midwest Sav. Ass'n v. Riverbend Associates, 724 F. Supp. 661, 661 (D.Minn, 1989).	20
Mivan (Florida), Inc. v. Metric Constructors, Inc., 857 So. 2d 901 (Fla. 5th DCA 2003).	23
Rollins v. Alvarez 792 So. 2d 695 (Fla. 5th DCA 2001).	15
Taylor v. Deutsche Bank Nat'l Trust Co. 44 So.3d 618 (Fla. 5 th DCA 2010).	21
US Bank N.A. v. Flynn, 897 N.Y.S. 2d 855 (Sup.Ct. Suffolk County, March 12, 2010).	21
Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).	15, 22

TABLE OF STATUTES

§ 71.011, Fla. Stat. (2010).	6
§ 90.953, Fla. Stat. (2010).	18
§ 607.1432 Fla. Stat. (2010).	20
§ 608.4492 Fla. Stat. (2010).	19
§ 617.1432 Fla. Stat. (2010).	20
§ 671.201, Fla. Stat. (2010).	19
§ 673.3011, Fla. Stat. (2010).	19
§ 673.3081, Fla. Stat. (2010).	7, 17, 24
§ 673.5011, Fla. Stat. (2010).	8, 23
§ 673.3091, Fla. Stat. (2010).	6
§ 28 U.S.C. 754 (2009).	20

TABLE OF RULES

Fla. R. App. P. § 9.130.	6
Fla. R. Civ. P. § 1.510(c).	16, 17, 23, 24
Fla. R. Civ. P. § 1.510(e).	23

SECONDARY SOURCES

R. Clark, Clark on Receivers § 36 (1959).	20
---	----

STATEMENT OF THE CASE AND FACTS

This appeal is taken from the Circuit Court's decision to render Summary Final Judgment against the Appellants, Lewis Lyttle and Gladys Lyttle (hereafter, the “Appellants”). The Appellate Court of Florida has jurisdiction to consider the issues raised in this appeal under authority of the Fla. R. App. P. § 9.130, et seq.

The nature of the case below was as follows:

BankUnited, (hereafter, “Appellee”) filed a Complaint to foreclose the residential real property owned and occupied by the Appellants. (R. I/1) Appellee asserted ownership of the note and mortgage by way of assignment from the Federal Deposit Insurance Corporation, as Receiver for BankUnited, FSB. (R. I/1) Appellee claimed it owned and held the note and mortgage. (R. I/2, para. 4) Although there appeared to be a copy of a mortgage and a copy of a note attached to the Complaint, the Complaint failed to reference those attachments and failed to describe whether they were originals or copies. (R. I/1-27) The Complaint neither asserted a count for enforcement of a lost, destroyed or stolen instrument pursuant to § 673.3091, Fla. Stat. (2010), nor asserted a count for reestablishment of papers, records and files pursuant to § 71.011, Fla. Stat. (2010). (R. I/1-27)

On December 11, 2009, the Appellants filed their Answer with affirmative defenses. (R. I/29-30) The Appellants disputed the authenticity of the copies of the mortgage and note which were attached to the Complaint as well as the indorsements contained therein. (R. I/29-30, para.'s 3 and 4). The burden then shifted to the Appellee

to prove the authenticity of the documents and signatures. § 673.3081, Fla. Stat. (2010).

By way of the affirmative defenses, the Appellants also disputed the Plaintiff's standing. (R. I/29, para.'s 3 and 4)

On January 19, 2010, Appellee filed a Motion for Summary Final Judgment (R. I/32-33), Affidavit as to Attorney Fees (R. I/34-35), Affidavit of Time and Effort (R. I/36-37) and an Affidavit of Costs (R. I/38). These January 19, 2010 filings were utterly devoid of any statements or proofs that the note and mortgage were the originals or that the signatures were authentic and authorized.

On February 4, 2010, Appellee filed an Affidavit of Plaintiff's Claim. (R. I/44-46) The Affidavit of Plaintiff's Claim stated the Affiant had personal knowledge that the note attached to the Complaint was a genuine and authentic copy of the original. (R. I/44 - 45, para.s 2 and 3)

On May 7, 2010, Appellee filed an Amended Affidavit as to Attorney's Fees and Amended Affidavit of Time and Effort. (R. I/ 47-52) This document failed to address the affirmative defenses of the Appellants.

On May 24, 2010, the Appellants filed their Response to Motion for Summary Judgment. (R. I/53-54) This document restated the Appellants' affirmative defenses as they disputed the authenticity of the copy of the note attached to the Complaint and the standing of the Plaintiff. (R. I/53, para. 2 and 3)

On September 10, 2010, the Appellants filed another Opposition to Motion for Summary Judgment (R. I/74-80) with a supporting Affidavit of Lewis Clinton Lyttle.

(R. I/66-73). This second Opposition to Motion for Summary Judgment asserted the following: presentment of the promissory note had not occurred pursuant to §673.5011, Fla. Stat. (2009); Appellee's capacity remained at issue; Appellee was not a real party in interest as it was not the original lender; the note attached to the Complaint was not indorsed; there were no indorsements of the note to the Appellee by way of an allonge; there was no assignment of the note to the Appellee; and the Appellee offered no other evidence that demonstrated this particular note was enforceable by the Appellee. (R. I/76-77)

In addition to the Appellee's lack of supporting evidence, Lewis Clinton Lyttle's Affidavit provided that he was a test engineer with special knowledge, experience and equipment for testing the note to determine if the signatures thereon were original wet ink signatures. (R. I/63-73; 74-80) The Affidavit provided that Lewis Lyttle inspected the note in the court file with his specialized equipment, and in Lewis Lyttles opinion, the note in the court file was not an original (R. I/66, para. 3(a)); the signatures on that note were not originals (R. I/66, para. 3(b)); the signatures appeared to be mechanically created (R. I/66, para. 3(c)); the name of the lender is not the same as the name of the Plaintiff (R. I/66, para. 3(d)); there is no indorsement on the promissory note (R. I/66, para. 3(e)); there is no allonge transferring the promissory note to the Plaintiff (R. I/66, para. 3(f)); and that upon the Appellant's service of Request For Production, the Appellee responded, "See Note and Mortgage attached to Plaintiff's Complaint." (R. I/67, para. 6)

On September 10, 2010, Appellee filed a Reply to Affirmative Defenses Filed by

Defendants Lewis C. Lyttle and Gladys M. Lyttle. (R. I/81-89) This document provided that the Appellee was in possession of the original note and that it would file it at the time of the Summary Judgment hearing. (R. I/81, para. 3)

On September 16, 2010, this matter came on for hearing before the court on the Appellee's Motion for Summary Judgment. During argument, the Appellants argued that the Affidavit of Lewis Clinton Lyttle supported: he was a test engineer; had document enhancement equipment which could reveal whether a document was an original; he examined the note in the court file; in his opinion the note was not an original; the Appellee did not plead to re-establish a lost instrument; and that the Appellee produced no evidence of an original note. (R. III/p. 6, ln. 7 – 25 (transcript of hearing))

At the hearing, in response to Appellants' argument, Appellee responded, "And you know, now BankUnited was the holder of the note as you see we have filed with the Court just recently." (R. III/p. 7, ln. 11-13) The court responded, "I see it." (R. III/p. 7, ln. 14) In fact, the document was not on file with the Clerk until 5 days later, on September 21, 2010 as evidenced by the Appellee's Notice of Filing. (R. I/91-113) The Notice of Filing included the alleged "original Promissory Note;" however, it was deficient in many capacities. The Notice of Filing did not carry a certificate of service, was not served on the Appellants or their counsel prior to the hearing, was not filed with the Clerk prior to the hearing, and was unsupported by an affidavit. It was presented to the court shortly before the hearing.

This document was a complete surprise to the Appellants, as revealed by the transcript:

Mr. Gingo: Your Honor, did I understand correctly that there is another note in the file?

The Court: There is a note right here.

Mr. Gingo: And although my client hasn't sworn, may I ask him when he came and viewed the note?

The Court: Sure.

Mr. Gingo: Mr. Lyttle, when did you come up and view the note in the court file?

Mr. Lyttle: On August the 20th, Friday.

Mr. Gingo: Your Honor, is there anything that indicates when that note you're looking at was put in the Court file?

The Court: It's attached to the proposed final judgment in foreclosure. August 20th. What's probably in the file here, if I can find it, is the original motion to withdraw. Do you remember what page it was on that you saw it? If you looked in the file it should have a page.

Mr. Lyttle: I can't remember the page number Your Honor.

Mr. Gingo: Your Honor, since my client is interested only in looking at the original note, I think this motion is premature. It would give us a chance to look at that. The affirmative defense was that they didn't have the original note. He certainly made a good faith effort trying to look at it with his equipment. If this hearing were to either be put off for a month or just denied, it would give us an opportunity to actually look at that document, that new note that's in the court file.

The Court: Okay. I'll be right with you, sir. Just hang on a minute. Okay?

Mr. Nwadike: Yes, Your Honor.

The Court: I'm looking for the copy of the original note that was filed. That's what I am doing, Mr. Nwadike.

Mr. Nwadike: Okay. We did attach a copy of the original note to the complaint.

The Court: Yeah, I can see that. I can see the original mortgage. I don't see a copy of the note that looks the same as the one that's attached to the -- the mortgage is 17 pages. I have all 17 pages of the mortgage.

Mr. Nwadike: Okay.

The Court: Then I have, following that I have the adjustable rate note and the document that's attached to the proposed final judgment. There is no similar copy in the court file. In other words, the note that I see here at the top says, if I can read it, BankUnited Adjustable Rate Note, but it looks entirely different than -- I see what's the difference. It's just a smaller copy. Different font on the computer.

Mr. Nwadike: Okay.

The Court: That's the difference. This is it right here. So and this is the original. So I've got it.

Mr. Gingo: Well, what I would ask is that the Court deny that and allow us a chance to look at it under our equipment, and determine whether or not it's a genuine original note.
(R. III/page 8, ln. 7 – page 10, ln. 18)

The trial court then proceeded to deny the Appellants an opportunity prior to judgment to examine the note with their equipment so they could determine whether or not the note was a copy, authentic, original or fraudulent. Instead, the court set a sale date 90 days out and ordered that the “original note” remain in the court file for that 90

day period for the Appellants' inspection. The discussion continued:

The Court: Well, it's got Mr. Lyttle's signature in blue ink.

Mr. Gingo: There are machines that are available, I have them on my website, where they actually can reproduce a human signature, even varying the pressure.

And Mr. Lyttle has hired a previous expert to examine some notes. And there is an Attorney General investigation currently going on, a civil investigation with several firms for creating fraudulent documents.

Mr. Lyttle has been prompted to purchase this expensive equipment to view these notes because that's of significant interest to him.

The Court: So he's saying he's never signed a note ever with this?

Mr. Gingo: No, he certainly signed a note. The question is whether or not the note that's in your hand is the original note.

The Court: All right. Well, I don't think there's sufficient evidence before the court to say that this is not the original note. And the original note is in the file.

I mean it was – a copy of it was attached to the complaint. It has his initials on every page. It has signatures that comport with the note that has been attached to the complaint.

Mr. Gingo: But Your Honor, if what the Court believes to be a truly original note just came into the court file, Mr. Lyttle hasn't had a chance to actually look at it. He would love the opportunity to actually examine it with his equipment.

The Court: Okay. Anything else you want to add, Mr. Nwadike?

Mr. Nwadike: Yes, Your Honor. I mean to address counsel's request to view the note under the specialized equipment, I feel that those are outside the bounds of the motion for summary

final judgment.

You know, what we're here for is we're looking at the pleading, and any exhibits attached to the pleading and including affidavits. And beyond that is – anything else is outside the bounds of the motion, this motion.

The Court: Ok. Let me check one thing and I'll be right back with you.

Mr. Nwadike: Thank you, Your Honor.

The Court: I reviewed Defendants' opposition to the motion for summary judgment. I didn't see this listed as any defense.

Page five, paragraph three says, I'm a college graduate test engineer. There is not – I have concluded there is more likely than not the promissory note is not an original.

Well, I can tell. The document we looked at is clearly not the original because it's clearly a copy attached to the complaint. The signatures thereon are not original because it's a copy.

The signatures appear to be mechanically created on – well, of course they were. They were copied. The name of the lender is not the same. Well, that's not true.

There is no endorsement on the promissory note. Your in possession of the promissory note. As long as you're in possession it's a negotiable instrument.

Look, if he wants to have an opportunity to look at this, he can have all the opportunity he wants. What I'm going to do, sir, and Mr. Nwadike, if you agree to a 90 day sale date?

Mr. Nwadike: Yes. I have no objection to a 90 sale date. Your Honor.

The Court: 90 days. If you see something different, you tell me.

Mr. Gingo: Okay.

Mr. Nwadike: Okay.

Mr. Gingo: Your Honor, the original note will stay in the file?

The Court: Absolutely.

Mr. Gingo: That would be fine. Thank you.

The Court: And at times, sir, after judgment is entered, oftentimes lending institutions ask for the note back and a copy substituted. On this one, let's don't do that.

Mr. Nwadike: Okay.

The Court: Okay? And you see right here?

Mr. Gingo: Yes, sir.

The Court: I have put a 90 day sale date, which means that the Clerk will set it 90 days out from today's date, whatever date it might be, unless it falls on a Saturday or Sunday or a holiday.

(R. III/page 10, ln. 19 – page 14, ln. 7)

The trial court thereupon granted Summary Judgment to Appellee. (R. II/123-126)

On Friday, September 24, 2010, only eight days after the Summary Judgment hearing, Appellant, Lewis Lyttle, went to the Clerk's office with his specialized equipment to inspect the “original note” in the court file. The Clerk brought Appellant the file but the “original note” was not in it. The Clerk advised Appellant that she would try to locate the document. (R. I/119, para. 5) Appellant returned to the Clerk on Friday, October 1, 2010 to inspect the “original note”. This time, two different clerks assisted

him in searching for the “original note”. The clerks concluded that the note was not in the file and was not in the courthouse. (R. I/120, para. 6)

On October 7, 2010, Appellant filed an Emergency Motion to Set Aside Summary Judgment or for Other Appropriate Relief. (R. I/114) This document was supported by the Affidavit of Lewis Clinton Lyttle in Support of Motion for Summary Judgment, which, though it was mis-titled, it was physically attached to the emergency motion and referenced in the emergency motion. (R. I/114-118 and 119-120) In this emergency motion, Appellant repeated the trial court's order that the “original note” was to stay in the court file for 90 days so he could have an opportunity to inspect it and that it has since disappeared from the clerk's file and the courthouse before he could inspect it. (R. I/114 – 115) Appellant requested the court take action prior to the expiration of his appeal rights on October 16, 2010. (R. I/115, para. 3) The trial court failed to act on the emergency motion prior to October 16, 2010. The Appellants then invoked the jurisdiction of the Appellate court in order to preserve all procedural and substantive due process rights through a properly filed Notice of Appeal.

STANDARD ON APPEAL

The standard of review for summary judgment is de novo. *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001); *Rollins v. Alvarez*, 792 So. 2d 695 (Fla. 5th DCA 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000). In reviewing a summary judgment, the Court must determine whether there is any "genuine issue as to any material fact" and whether "the moving party is

entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c).

Issues of fact are "genuine" only if a reasonable jury, considering the evidence presented, could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Generally, "[t]he party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact." *City of Cocoa v. Leffler*, 762 So. 2d 1052,1055 (Fla. 5th DCA 2000). The evidence contained in the record, including supporting affidavits, must be considered in the light most favorable to the non-moving party, and if the slightest doubt exists, summary judgment must be reversed. *Krol v. City of Orlando*, 778 So. 2d 490, 492 (Fla. 5th DCA 2001).

SUMMARY OF THE ARGUMENTS

The Appellants challenged both the standing of the Appellee and the evidence in support of the Motion for Summary Final Judgment. Appellee was not the same entity as the original lender, BankUnited, FSB as evidenced by the note. The documents in this case demonstrate that Appellee appeared to be an assignee from an intermediary receiver (FDIC) for the original lender, BankUnited, FSB. The alleged "original" note that was presented to the court at the hearing was not indorsed, carried no allonges, no assignment, and no power of attorney by either the original lender or the intermediary receiver (FDIC). Therefore, Appellee had no standing to bring the action.

The Appellee violated the Florida Rules of Civil Procedure. "The movant shall serve the motion [for summary judgment] at least 20 days before the time fixed for the

hearing, and shall also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court.” Fla. R. Civ. P. 1.510(c) (2010) (emphasis added). Here, the original note had not been filed with the court at least 20 days prior to the hearing. The Appellant was entirely incapable of scrutinizing the alleged original note prior to the hearing and was provided no copy of that original note 20 days prior to the hearing.

The Appellants’ third affirmative defense challenged the authenticity of the note, which shifted the burden of proof of the authenticity to the Appellee pursuant to § 673.3081, Fla. Stat. (2010). The sole evidence Appellee provided to support the foreclosure was the Affidavit of Plaintiff’s Claim. (R. I/44-46) That evidence, from Affiant, Tina Bado, provided “. . . Affiant knows of her personal knowledge that the Plaintiff is the holder of what certain Note and Mortgage, copies of which are attached to the Complaint herein as Exhibits B and C.” (R. I/44, para. 2)

A copy of a negotiable instrument is not admissible as evidence under clearly defined circumstances. “A duplicate is admissible to the same extent as an original unless: (1) The document or writing is a negotiable instrument as defined in s. 673.1041 ... or any other writing that evidences a right to the payment of money, is not itself a security agreement or lease, and is of a type that is transferred by delivery in the ordinary course of business with any necessary endorsement or assignment. (2) A genuine question is raised about the authenticity of the original or any other document or writing. (3) It is unfair, under the circumstances, to admit the duplicate in lieu of the

original.” 90.953 Fla. Stat. (2010) (emphasis added).

Here, the Court found that the note sued upon was a negotiable instrument. (R. III/page 13, ln. 6-7). A genuine question was raised by the Appellants’ affirmative defenses and supporting affidavits. It was unfairly prejudicial for the Appellee to withhold the original note - if in fact it was the original which remains disputed. The Appellee’s intentional action deprived the Appellants the opportunity to scrutinize the authenticity and originality of alleged evidence upon which this case turns.

The holding of the trial court violated all standards of fair justice, the Florida Rules of Civil Procedure and Florida Rules of Evidence. The court’s order that the “original” note remain in the court file for Appellant’s post-judgment inspection was wholly inadequate to cure the procedural and substantive due process violations. Further, the alleged “original” note mysteriously vanished from the Clerks file and the Courthouse before it could be examined for fraud further precluding any possibility of review.

FIRST ARGUMENT

APPELLEE OFFERED NO EVIDENCE OF ENTITLEMENT TO ENFORCE THE PROMISSORY NOTE

In the Appellants’ Answer, Affirmative Defense number 4 challenged the standing of the Appellee. (R. I/29) In Appellee’s Affidavit of Plaintiff’s Claim, the Affiant, Tina Bado, claimed “. . . Plaintiff is the holder of what certain Note and Mortgage, copies of which are attached to the Complaint herein as Exhibits B and C.” (R. I/44, para. 2)

Florida law defines those entitled to enforce a negotiable instrument as a “holder” of the instrument, a non-holder in possession who has the rights of a holder or a person not in possession who is entitled to enforce it as a lost instrument. (§ 673.3011, Fla. Stat. (2009)) A “holder” is defined as “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” §671.201, Fla. Stat. (2009)

The Appellants argued in their Opposition to Motion for Summary Judgment that Appellee’s evidence failed to show Appellee’s capacity to enforce the note as it was not a real party in interest. The lender on the note was BankUnited, FSB whereas the Appellee was an entirely different entity. (R. I/76-77) The court considered this statement and stated “The name of the lender is not the same. Well, that's not true.” (R. III/13, ln. 3-4) This conclusion by the trial court was clearly incorrect and unsupported by admissible evidence.

In the Appellee's Affidavit of Plaintiff's Claim, the Affiant, Tina Bado, stated, “Your Affiant is employed by BankUnited, Assignee of FDIC, as Receiver for BankUnited, FSB”. (R. I/44, para. 1) By the Appellee’s own pleadings, it asserts that the FDIC owned the assets of BankUnited, FSB through receivership. The alleged assignment of the FDIC’s assets to the Appellee must be evidenced upon a valid assignment of note and mortgage - evidence never submitted to the trial court.

The Appellee’s pleadings clearly indicate BankUnited FSB is in receivership. Receivers are appointed by court order to wind up and liquidate businesses. § 608.4492;

§ 617.1432; and § 607.1432 Fla. Stat. (2009); see also § 28 U.S.C. 754 (2009), *Haile v. Henderson Nat. Bank*, 657 F.2d 816, 822 (6th Cir. 1981); *Midwest Sav. Ass'n v. Riverbend Associates*, 724 F. Supp. 661, 661 (D.Minn, 1989). Appointment of a receiver puts all the property subject to the receivership in the custody of the court. See R. Clark, Clark on Receivers § 36 (1959) (receiver is an arm or administering hand of the court); *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 372 (1908) (receiver is officer of court, and its property is in custodia legis); *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100, 103 (10th Cir. 1970) (funds in custodia legis are the same as if actual possession is with an officer of the court). Any interference with the receiver's functions is punishable by contempt. See, e.g., *Clear Creek Power & Development Co. v. Cutler*, 79 Colo. 355, 245 P. 939 (1926). "An action in which a receiver has been appointed may be dismissed only by court order." Fed. R. Civ. P. 66 (2009).

Here, the Appellee pled that its status as owner and holder was by way of transfer from a receiver - the FDIC. Clearly, an undisclosed federal or state court maintained custody of the note and the FDIC possessed and controlled it on behalf of the undisclosed court.

The existence of a receivership indicates the original lender no longer owned and held the subject note. If the Appellee attempted to enforce this note and foreclose upon the note, then it acted in violation of the receivership authorization and misused property in custody of a court.

The fact that a receivership existed for BankUnited FSB and not for the Appellee

also indicates the Appellee is a separate entity from the original lender. The trial court's finding of fact that the Appellee and the original lender were the same entity is clearly erroneous.

The Appellants also argued in their Opposition to Summary Judgment that there were no indorsements on the note, there were no allonges to the note, there were no assignments of the note to the Appellee, and the Appellee offered no other evidence entitlement to enforce this particular note. (R. I/76 – 77) The court considered this claim as well and stated, “There is no indorsement on the promissory note. You're in possession of the promissory note. As long as you're in possession it's a negotiable instrument.” (R. III/13, ln. 5-7)

This Court recently clarified that where a foreclosing plaintiff had possession of the original note which was not payable to the foreclosing party, that it could still enforce the note if there was evidence that the foreclosing party owned it or validly held it. In *Taylor v. Deutsche Bank Nat'l Trust Co.*, 44 So.3d 618, 623-624, (Fla. 5th DCA 2010), this Court stated:

As a general proposition, evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, is required to prove that a party validly holds the note and mortgage it seeks to foreclose. See *Booker v. Sarasota, Inc.*, 707 So. 2D 886, 889 (Fla. 1st DCA 1998); *BAC Funding Consortium, Inc. ISAOA/ATIMIA*. The written assignment filed as part of the summary judgment documents in the case before us specifically recites that MERS assigned to the appellee, Deutsche Bank, "the Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in the Mortgage and Note." (Emphasis supplied). More importantly, as a nonholder in possession of the instrument who had the rights of a holder, MERS assigned to Deutsche Bank its explicit power, granted by the mortgage, to enforce the note by foreclosing the mortgage on the subject property. We conclude, accordingly, that the written

assignment of the note and mortgage from MERS to Deutsche Bank properly transferred the note and mortgage to Deutsche Bank. The transfer, moreover, was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note at the time of the assignment, because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment. See *US Bank, N.A. v. Flynn*, 897 N.Y.S.2d 855 (Sup.Ct. Suffolk County, March 12, 2010).

Appellee is a different entity than the entity on the note. There is no indorsement to Appellee, no allonge to Appellee, no assignment to Appellee and no power of attorney demonstrating authority to act on behalf of the owner of the note. The Taylor opinion seems to establish precedent – no indorsement, no allonge, no assignment, no power of attorney – no foreclosure.

SECOND ARGUMENT

APPELLEE FAILED TO PROVIDE ADMISSIBLE, TIMELY EVIDENCE THAT IT WAS ENTITLED TO ENFORCE THE PROMISSORY NOTE

Summary judgment is only proper when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). “Generally, ‘[t]he party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact.’” *Krol v. City of Orlando*, 778 So. 2d 490, 92 (Fla. 5th DCA 2001), (citing *City of Cocoa v. Leffler*, 762 So. 2d 1052, 1055 (Fla. 5th DCA 2000) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966))). The court must draw every possible inference in favor of the nonmoving party. *Kitchen v. Ebonite 6 Recreation Ctrs., Inc.*, 856 So. 2d

1083, 1085 (Fla. 5th DCA 2003). The slightest doubt will bar an entry of summary judgment. *Mivan (Florida), Inc. v. Metric Constructors, Inc.*, 857 So. 2d 901, 902 (Fla. 5th DCA 2003).

The requirements for filing a motion for summary judgment and the standard for considering the motion are set forth by Fla. R. Civ. P. § 1.510(c):

The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant shall serve the motion at least 20 days before the time fixed for the hearing, and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court. . . .

Fla. R. Civ. P. § 1.510(e) describes the requirement that sworn evidence to be attached to the affidavit:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

The note was the key issue to the Appellants' defense. The Appellants were entitled to inspect the note pursuant to their affirmative defenses and their Request to Produce. The Appellee deprived the Appellants their right of presentment pursuant to § 673.5011, Fla. Stat. (2010). The Appellee deprived the Appellants of their right to inspect the original note.

Appellants denied the authenticity of the signatures on the note thereby shifting

the burden back to the Plaintiff to establish their validity and authenticity pursuant to § 673.3081, Fla. Stat. (2010). Appellant, Mr. Lyttle, was a test engineer and in possession of equipment designed to inspect documents. The Appellee's actions prevented the Appellant from scrutinizing the original evidence in violation of the Florida Rules of Civil Procedure, Florida Rules of Evidence and Florida Statutes.

The Appellee intentionally withheld vital evidence - "evidence on which the movant relie[d] that ha[d] not already been filed with the court." Fla. R. Civ. P. 1.510(c) (2010). The Appellee failed to file the original note with the court 20 days prior to the summary judgment hearing. The Appellee failed to provide a the required copy of this vital piece of evidence to the Appellants at least 20 days to prior to the hearing. Rather, Appellee clandestinely slipped the alleged "original" note into the court file with an unfiled, attached Notice of Filing. This was accomplished sometime shortly prior to the hearing.

It should also be noted by this Court that this Notice of Filing failed to contain a certificate of service.

Florida Rule of Civil Procedure 1.510(c) also requires that summary judgment be based upon admissible evidence. Appellee offered no affidavit to support that the note it attached to the clandestine Notice of Filing was the original note executed by the Appellants. Appellee failed to serve a copy of this filing upon the Appellants. On the contrary, Appellee slipped a note into the court file. The trial court looked at the document and, over objections and defenses asserted by the Appellants, made a finding

of fact that because the document contained blue ink, it was the original. (R. III/10, ln. 19-24) The trial court's finding of facts were not based upon admissible evidence submitted pursuant to the Florida Rules of Evidence and Florida Rules of Civil Procedure.

The Court ordered that the "original" Promissory Note remain in the Court file for the Appellants' examination. Within one week of the Summary Judgment hearing, the alleged original note was removed from the clerks file and the Courthouse without any explanation whatsoever.

The Appellee's actions violated the Appellants' procedural and substantive due process right. The summary judgment hearing violated procedural and substantive due process. The trial court's findings of fact were not based upon admissible evidence, properly filed with the court, supported by testimony or affidavit. Although foreclosures in Florida have resulted in the congestion of our courts dockets, procedural and substantive due process must not be sacrificed for judicial economy.

CONCLUSION

Consistent with the Taylor opinion, when the named Plaintiff is not the same entity as the lender on the note, and there are no indorsements, allonges, assignments or powers of attorney, then the Plaintiff has no standing to enforce or sue on the note. Wherefore, Appellee has no standing to enforce or sue on the note.

Evidence in support of the moving party's motion for summary judgment must be served at least 20 days before the hearing, and in this case, it was not timely served.

Also, evidence must be admissible. The Notice of Filing containing the alleged original note was not supported by an affidavit and as such, was not admissible evidence for purposes of summary judgment. The trial court's findings of facts did not cure this defect. The trial court's finding of fact - specifically that the note was the original based upon blue ink found on the document - was an abuse of discretion as the Appellee failed to submit any evidence as to the authenticity and validity of the document.

WHEREFORE, the Circuit Court's judgment should be set aside and the matter remanded.

Respectfully Submitted,

George Gingo, FBN 879533
James Orth, FBN 75941
P.O. Box 838
Mims, FL 32754
321-264-9624 Office
321-383-1105 Fax
ggingo@yahoo.com
jamesorthlaw@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Van Ness Law Firm, P.A., 1239 E. Newport Center Drive, Suite 110, Deerfield Beach, FL 33442, on this 10th day of January, 2011.

George M. Gingo, FBN 879533

CERTIFICATE OF FONT COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point font and complies with the font requirements of the Florida Rule of Appellate Procedure 9.210(a) (2).

By: _____
George M. Gingo, FBN 879533